

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 10TH APRIL 2007 / 20TH CHAITHRA 1929

SA.No. 750 of 1993(E)

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AS.7/1988 of SUB COURT, TIRUR  
OS.239/1984 of MUNSIFF COURT,PARAPPANANGADI  
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APPELLANTS:/RESPONDENTS 1 TO 5 AND 12/PLAINTIFFS

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1. THAZHATHETHIL AYYAPPAN (DIED)  
S/O.KUMARAN, AGED 35 YEARS,  
RESIDING AT THENHIPALAM AMSOM, TIRUR TALUK.
  2. SULOCHANA, AGED 32 YEARS, RESIDING -DO-
  3. APPUKUTTAN, AGED 30 YEARS,  
RESIDING -DO-
  4. VIJAYA KUMARI, AGED 27 YEARS,  
RESIDING -DO-
  5. CHINNAMMU ALIAS KAMALAKSHI,  
W/O.THAZHETHIL KUMARAN,  
AGED 62 YEARS, RESIDING -DO-
  6. SOBHANA, W/O.AYYAPPAN  
AGED 27 YEARS, RESIDING -DO-
  7. ABHILASH, (MINOR) AGED 7 YEARS,  
RESIDING -DO-
  8. ASHA MOL, (MINOR) AGED 6 YEARS,  
RESIDING -DO-
- (MINORS 7 AND 8TH BY GUARDIAN 6TH APPELLANT  
SOBHANA (MOTHER)

BY ADV. SRI.T.A.RAMADASAN,A.K.ALEX,K.ABOOTY

RESPONDENTS: APPELLANT/DEFENDANTS

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1. POKKATTUNGAL ABDURAHIMANKUTTY,  
S/O.MARAKKAR,AGED 67 YEARS,  
THENHIPALAM AMSOM, TIRUR TALUK.
  2. KUNHIKAMMUTTY, S/O.MARAKKAR,  
RESIDING -DO- (DIED. LRS.IMPLEADED)
  3. UNYALI, S/O.RESIDING -DO-
  4. IMBICHIKOYA, S/O.MARAKKAR  
RESIDING -DO-

5. SAIDALAVI, RESIDING -DO-
6. KADIYUMMA, RESIDING -DO-
7. PATHUMMAKUTTY UMMA, RESIDING -DO-

SUPPLEMENTARY RESPONDENTS

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SUPPL.R8. AYISHAKUTTY,  
W/O.LATE KUNHIKAMMUTTY  
NADUTHODY HOUSE,  
P.O.CHENAKKALANGADI

" R9. ABOOTY  
S/O.LATE KUNHIKAMMUTTY  
RESIDING -DO- -DO-

" R10. NABEESA  
D/O.LATE KUNHIKAMMUTTY  
KAVUMPURAM HOUSE, P.O.CHENAKKALANGADI  
VIA. THENHIPALAM  
673 636. MALAPPURAM.

(SUPPLEMENTARY RESPONDENTS 8 TO 10 ARE IMPEADED AS THE  
LEGAL REPRESENTATIVES OF DECEASED 2ND RESPONDENT AS PER  
ORDER DATED 1/6/04 ON CMP 2002/01.)

BY ADV. SRI.K.K.MOHAMMED RAVUF FOR R1

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD  
ON 10/4 /2007 THE COURT ON 10/04/2007 DELIVERED THE  
FOLLOWING:

ORDER ON C.M.P.NO.1849/1993 IN S.A.NO.750/1993

10.4.07                      DISMISSED      SD/- M.Sasidharan Nambiar  
Judge

/true copy/

P.S. To Judge

**M.SASIDHARAN NAMBIAR, J.**

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S.A. NO.750 OF 1993

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Dated this the 10<sup>th</sup> day of April, 2007

**JUDGMENT**

Plaintiffs in O.S.239/1984 on the file of Munsiff Court, Parappanangadi are the appellants. Suit was filed seeking a decree for declaration that Ext.A12 preliminary decree in O.S.84/1980 is not binding on the appellants or to the plaint schedule property and plaint schedule property is not available for partition and for a consequential decree for permanent prohibitory injunction. Respondents are the defendants. Plaint schedule property is 26 cents in R.S.50/7 by name Chenaparamba. The case of appellants was that property originally belonged to Porakkadan Kunhikammatty and it was obtained from him by T.P. Muhammed and Kumaran, deceased father of appellants 1 to 4 and husband of 5<sup>th</sup> respondent, obtained the property in 1960 as per an oral verumpattom lease and since then Kumaran has been

in possession of the property and after his death appellants have been in possession. It was contended that appellants obtained the jenm right impleading respondents 6 and 7 also in O.A.6599/1976 from Land Tribunal, Parappanangadi and 7<sup>th</sup> respondent filed O.S.20/1980 seeking a decree for permanent prohibitory injunction and that suit was dismissed on 20.9.1982 and when that suit was pending, first respondent instituted O.S.84/1980 and obtained the preliminary decree which is not binding on the appellants or plaint schedule property and therefore appellants are entitled to the decree for declaration of injunction sought for. Except first respondent, all other defendants remained absent and were set ex parte. First respondent filed the written statement contending that T.P. Muhammed had no right over the property and there was no oral lease in favour of Kumaran and the plaint schedule property originally belonged to Marakkar deceased father of defendants and he was in possession of

the property till his death and thereafter first respondent filed O.S.84/1980 seeking a decree for partition and a preliminary decree was passed after setting aside Ext.B1 settlement deed 988/1970 executed by father Marakkar. First respondent was not a party in O.A.6599/1976 and the order is not valid or binding on first respondent or the plaint schedule property and appellants have no right over the property and is not entitled to the decree sought for.

2. Learned Munsiff, after framing the necessary issues and recording the evidence of Pws. 1 to 3, DW1 and Exts.A1 to A12 and B1 to B3, granted a decree as sought for by appellants. First respondent challenged the decree and judgment before Sub Court, Tirur in A.S.7/1988. The first appellate court on reappreciation of evidence held that appellants failed to establish that T.P.Muhammed had any right over the plaint schedule property or that he granted a lease in favour of Kumaran. On the evidence, it was found that

appellants did not establish their right or title to the plaint schedule property and therefore they are not entitled to the decree granted by the trial court. The appeal was allowed and the suit was dismissed. The Second Appeal is filed challenging the decree and judgment of the first Appellate Court.

3. The first appeal was admitted formulating the following substantial questions of law.

1) Whether first appellate court was correct in setting aside the decree of the trial court when the order of Land Tribunal and the purchase certificate which were not set aside or declared to be null and void is binding on the plaint schedule property?

2) Whether first appellate court was correct in finding that Ext.A12 decree is binding on the plaint schedule property or that plaint schedule property is available for partition among the sharers?

4. Learned counsel appearing for appellants

and first respondent were heard.

5.Learned counsel appearing for the appellants argued that in the written statement of first respondent itself possession of the house and entrustment of the house as alleged in the plaint was admitted and when first respondent was examined as DW1, the fact that mother of first respondent assigned portions of Chenaparamba in favour of T.P.Muhammed was also admitted and in such circumstance, first appellate court should not have interfered with the decree granted by the trial court. Learned counsel also argued that respondents 6 and 7 were parties to the O.A. proceedings before the Land Tribunal and under Ext.B1 settlement deed plaint schedule property, as admitted by DW1, was allotted to the 7<sup>th</sup> respondent and 7<sup>th</sup> respondent did not dispute the tenancy and first appellate court therefore should have found that the order of the Land Tribunal is binding on respondents and the plaint schedule property and therefore the decree granted by the trial court

should have been upheld. Learned counsel appearing for first respondent argued that first appellate court elaborately considered the evidence and rightly found that appellants did not establish their right over the property. It was further argued that the lease set up by appellants was under T.P. Muhammed and there was no evidence to prove that T.P.Muhammed had any right over the plaint schedule property and though DW1 admitted that his mother sold part of Chenaparamba in favour of T.P. Muhammed, the assignment deed in favour of T.P. Muhammed was not produced and it was not established that plaint schedule property was a portion of the property transferred to T.P.Muhammed and in such circumstance, first Appellate Court rightly found that appellants have no tenancy right and they are not entitled to the decree sought for.

6. In the suit, appellants did not seek a decree for declaration of their title to the plaint schedule property. The declaration sought for was that Ext.A12 decree in O.S.84/1980 was not binding

on the appellants or the plaint schedule property. True, a consequential relief of injunction was also sought. According to appellants, plaint schedule property originally belonged to Kunhikammatty and from Kunhikammatty, T.P. Muhammed obtained the property and from the said T.P.Muhammed as per an oral verumpattam lease in 1960, Kumaran obtained the property and 5<sup>th</sup> appellant is the widow and other appellants the children of Kumaran. According to appellants, they are the successors of Kumaran and obtained jenm right from Land Tribunal as per order in O.A.6599/1976. But the order of the Land Tribunal was not produced before courts below. It is not known what was the right agitated in O.A.6599/1976. Though it was argued by learned counsel appearing for appellants that respondents 6 and 7 were parties to O.A.6599/1976 and under Ext.B1 settlement deed plaint schedule property, which was item No.29 therein, was allotted to the 7<sup>th</sup> respondent and therefore the order in O.A is binding on respondents and plaint

schedule property, under the decree and judgment in O.S.84/1980, Ext.B1 settlement deed was set aside. Therefore relying on Ext.B1 appellants cannot contend that plaint schedule property belonged to 7<sup>th</sup> respondent. As is clear from Ext. B3 the properties divided under Ext.B3 originally belonged to Ayisakutty, the wife of Marakkar and respondents are their children. Under Ext.B3 the properties of Aiyasakutty were divided and items 1 to 3 therein were allotted to the share of Marakkar. Item No.2 of Ext.B3 is the plaint schedule property as is clear from the description of the property. Marakkar who obtained properties (items 1 to 3) under Ext.B3, settled the properties in favour of the children under Ext.B1 settlement deed dated 27.6.1970. But under Ext.B2 judgment and Ext.A12 decree, Ext.B1 was set aside. When O.A.6599/1976 was filed, Marakkar was alive. He was not impleaded in the O.A. Eventhough respondents 6 and 7 were impleaded in the O.A., appellants have no case that they were impleaded as they derived right

under Ext.B1. First respondent was not a party to the O.A. The case of appellants was also not that neither Kumaran nor appellants were tenants under either Aiyasakutty or Marakkar or 7<sup>th</sup> respondent or the other respondents. Instead what was contended was that Kumaran was a tenant of T.P.Muhammed. As rightly found by the courts below, there is no evidence to prove that T.P.Muhammed, had any right over the plaint schedule property. Eventhough it was argued that Aiyasakutty had assigned the property to T.P.Muhammed, as admitted by DW1, there is no evidence to prove what are the properties so assigned to T.P. Mohammed and whether it is inclusive of the plaint schedule property. Unless it is established that the plaint schedule property was part of the property alienated by Aiyasakutty in favour of T.P.Muhammed, appellants cannot contend that T.P.Muhammed had granted a lease in favour of Kumaran and therefore being successors of Kumaran, they are tenants. On the evidence first appellate court rightly found that appellants

did not establish that the plaint schedule property belonged to T.P.Muhammed. Therefore appellants cannot claim any right over the plaint schedule property. Unless appellants could establish that the property belonged to T.P.Muhammed and was obtained on lease by Kumaran. In such circumstances by virtue of the order of Land Tribunal appellants cannot claim that they are owners of the plaint schedule property. Hence they are not entitled to get a decree for declaration that Ext.A12 decree is not binding on them. The first Appellate Court rightly appreciated the evidence and found that appellants are not entitled to the decree for declaration sought for. In such circumstance, there is no merit in the appeal and it is dismissed. It is made clear that appellants did not seek a decree for declaration of their title to the plaint schedule property and the decision in this suit will not prevent the appellants from seeking a declaration of their title to the property in accordance with law, if they have such

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right or title.

tpl/-

M.SASIDHARAN NAMBIAR  
JUDGE

M.SASIDHARAN NAMBIAR, J.

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S.A.NO.750 /03  
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JUDGMENT

10<sup>th</sup> APRIL,2007